No. 96-873

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

APOSTOLOS TSIMBIDAROS,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, CLC and PAINTERS LOCAL UNION 1719,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in dismissing petitioner's complaint as a Rule 37 discovery sanction, where petitioner had: terminated an initial attempt to depose him by claiming to be incapacitated by medication; defied several discovery orders requiring responses to written discovery and submission to deposition; ignored repeated court warnings that continued noncooperation may result in dismissal; and wilfully failed to appear at a second deposition, without credible excuse and without advance notice to counsel?

2. Should the District Court Judge and Magistrate Judge be disqualified on grounds of bias based on an unsubstantiated assertion that the Magistrate is a union member and supporter, and based on judicial rulings which are consistent with governing precedent?

3. Did the District Court err in awarding reasonable expenses to respondents where, without advance notice to counsel, petitioner wilfully failed to attend his second deposition, given the court's prior warnings that sanctions, including attorneys' fees, would result from such noncooperation?

4. Should the lower court's Rule 37 dismissal sanction be reversed on grounds that petitioner's lawsuit allegedly presents issues of "national importance," where no abuse of discretion may be found?

LIST OF PARTIES TO THE PROCEEDING

The petitioner is Apostolos Tsimbidaros, plaintiff and appellant below.

The respondents, defendants and appellees below, are correctly identified in the caption except that International Brotherhood of Painters and Allied Trades should be International Brotherhood of Painters and Allied Trades, AFL-CIO, CLC.

Both respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari as it relies on evidentiary matters and legal claims which were never presented to the District Court or to the Second Circuit Court of Appeals.

Petitioner, as *pro se* plaintiff, filed his lawsuit on June 12, 1992. It alleged, in essence, that as labor organizations in which petitioner was then a member, respondents had breached their contractual obligations by failing to refer him to work on construction projects in accordance with the governing union constitution and by-laws. Petitioner did not plead a cause of action under the Americans With Disabilities Act ["ADA"].

Discovery was critical, as petitioner's complaint was extremely vague as to respondents' alleged misconduct. As District Court Judge Daly noted after the first year of litigation, the complaint was "a hodge-podge of allegations, and the defendants have labored to glean the possible legal foundations supporting the plaintiff's claims." Ruling on Defendants' Motion to Dismiss, March 29, 1993.

Petitioner failed utterly to satisfy his discovery obligations. Despite numerous orders compelling discovery, petitioner repeatedly failed to provide timely responses to interrogatories and requests for production. Written discovery served in August 1993 was not properly responded to by petitioner until January 10, 1995. (Respondents' Appendix at 13-14).

Petitioner also persistently refused to cooperate in deposition. Respondents' first attempt to depose petitioner in August 1993 was frustrated by petitioner's interruption of the first question posed to read from a prepared written statement that he could not be bound by his testimony, given the effect of medication taken earlier that day. (Petitioner's Appendix at 5; Respondents' Appendix at 13). Petitioner had given no prior notice to counsel that he would be "unable" to testify. Counsel for the respondent International incurred substantial expense in needlessly traveling to Bridgeport, Connecticut from Washington, D.C.

Respondents filed a motion for sanctions. In one of its rulings of October 12, 1993, the Court warned petitioner that:

> irrespective of the ultimate disposition of this motion, continued violation of his discovery obligations will result in the imposition of sanctions, including attorneys' fees and/or the dismissal with prejudice of this lawsuit.

(Petitioner's Appendix at 5; Respondents' Appendix at 1).

The Court issued several other discovery rulings on October 12, 1993. Denying petitioner's motion to quash future attempts to depose him, the Court ordered petitioner to attend his renoticed deposition and specifically warned him that "failure to attend his deposition may result in the imposition of drastic sanctions, including dismissal of this lawsuit with prejudice." (Respondents' Appendix at 3 & 13).[1] The Court also granted respondents' motion to compel, ordering responses to interrogatories and requests for production by November 2, 1993 and granting respondents thirty days post-compliance to take petitioner's deposition. (Petitioner's Appendix at 5; Respondents' Appendix at 4-5, 7 & 13).

Petitioner failed to comply with the court order requiring discovery responses by November 2, 1993. Respondents therefore moved for a dismissal sanction, which motion the Court denied without prejudice on December 8, 1993. (December 8, 1993 Ruling of Magistrate Judge, affirmed by District Court on January 4, 1994).

Petitioner thereafter continued to defy the court's discovery orders. As of Spring, 1994, respondents again sought a Rule 37 dismissal sanction. On July 5, 1994, the Court again declined to dismiss this action, citing petitioner's *pro se* status. (Respondents' Appendix at 10). Observing that "given plaintiff's complete lack of cooperation in discovery, resort to the court's intervention is all the defendants have left" (Respondents' Appendix at 9), the Court again ordered that petitioner submit complete discovery responses within twenty days (i.e., by July 25, 1994). The Court reaffirmed that respondents would be granted thirty days post-compliance to depose petitioner. Importantly, the Court warned:

> The Court is mindful that the terms of this Order are virtually identical to the terms of the October [1993]

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[1] That Order further endorsed noticing petitioner's deposition at the offices of the local union's counsel in East Hartford, Connecticut. (Respondents' Appendix at 2).

> Order. . . . The plaintiff is cautioned that his failure to obey this or any other Order of this court or any further manifestation of a continued failure to cooperate in discovery will result in this case being dismissed with prejudice.

(Respondents' Appendix at 11 & 13-14).

In defiance of this court order, petitioner failed to comply with respondents' interrogatories and requests for production by July 25, 1994. In the face of persistent demands and efforts to facilitate compliance on the part of respondents, petitioner ultimately complied on January 10, 1995. (Respondents' Appendix at 14).

By the express terms of the Court's prior orders, respondents were obligated to depose petitioner by no later than February 9, 1995, or risk the close of discovery. Respondents sent petitioner a notice of deposition on the same day his final compliance was received, scheduling the deposition for January 26, 1995. Attached to the deposition notice was a letter specifically instructing petitioner to provide advance written notice if, for any reason, he was unable to attend. (Respondents' Appendix at 14).

On January 17, 1995, petitioner filed motions requesting deposition by telephone or by written question. He did not, however, file a motion to quash or for extension of time. (Respondents' Appendix at 14). Respondents' counsel received service copies of these motions on January 18th. Otherwise petitioner never communicated with respondents concerning his plans for attendance at deposition. At no time did he notify respondents that he would not attend.[2]

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[2] As an example of factual issues which are raised here for the first time, petitioner states that he contacted respondents' counsel prior to the date of his deposition and instructed them to cancel it. (Petition at 12). Not only is this assertion false, but petitioner never before disputed that he failed to provide advance notice of

By Federal Express overnight delivery, respondents sent petitioner a letter on January 18, 1995, together with their service copies of objections to his motions. Petitioner was reminded that respondents had been ordered by the Court to take his deposition within thirty days of his compliance with written discovery. Respondents informed petitioner that he was still expected to attend his deposition. Based on their prior experience with him, respondents advised petitioner that, if he intended to claim a medical excuse for non-attendance, he should file an emergency motion for extension of the time for discovery. Respondents assured petitioner that they would not oppose such a motion—if he provided appropriate medical documentation from a physician to demonstrate an inability to travel and to attend his deposition. Finally, respondents reiterated their demand that, if petitioner intended not to attend, he provide advance written notice to counsel.

Petitioner failed to attend this deposition noticed for January 26, 1995. He failed to provide advance notice to counsel of his non-attendance. As in August 1993, counsel for the International Union traveled needlessly to Connecticut from Washington, D.C., and respondents incurred $2,344.00 in unnecessary expenses.

On respondents' motion for discovery sanctions, Magistrate Judge Thomas Smith issued a recommended ruling on April 7, 1995, dismissing petitioner's lawsuit with prejudice pursuant to Rule 37 of the Federal Rules of Civil Procedure. In so doing, the Magistrate Judge found that petitioner had provided no legitimate excuse, such as proof of a medical disability, for his nonattendance at deposition, and that petitioner had knowingly and wilfully disobeyed a court order compelling him to attend. The Magistrate noted that he had repeatedly warned petitioner

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his nonattendance, either in writing or by telephone. Both the District Court and the Second Circuit Court of Appeals found that petitioner failed to provide such notice. (Petitioner's Appendix at 5-6 & 7; Respondents' Appendix at 14 & 15-16).

through successive court orders that his case would be dismissed with prejudice if he refused to comply with discovery. On that factual record, the Magistrate ordered a Rule 37 dismissal and further ordered an award of reasonable fees and costs of $2,344.00 against petitioner. (Respondents' Appendix at 15-17).

Upon petitioner's request for review, the District Court endorsed the Recommended Ruling on September 7, 1995. (Petitioner's Appendix at 3). The Second Circuit Court of Appeals denied petitioner's appeal on June 25, 1996. (Petitioner's Appendix at 4-7). The appellate court further denied petitioner's request for rehearing on August 15, 1996. (Petitioner's Appendix at 8).

REASONS FOR DENYING THE WRIT

The dismissal of petitioner's lawsuit as a Rule 37 sanction for noncooperation in discovery cannot be disturbed unless the District Court abused its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). Given the numerous warnings that were given and petitioner's willful failure to obey the court's orders, no abuse occurred. The petition for certiorari is founded on evidentiary matters and claims of law which were not presented below. The writ must therefore be denied.

I. PETITIONER NEITHER ARGUED BELOW THAT COURT OR COUNSEL VIOLATED THE AMERICANS WITH DISABILITIES ACT, NOR PRESENTED FACTS TO SUPPORT THIS CLAIM.

Petitioner argues that both the lower courts and respondents' counsel violated the ADA by failing to make reasonable accommodations for an alleged disability in scheduling his deposition. (Petition at 6-9). This legal argument is wholly new, never having been raised to the District Court or to the Second Circuit.[3] Absent extraordi-

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[3] Petitioner's many papers to the court mentioned the ADA in a different context on several occasions. Amongst his countless

nary circumstances, this Court wisely refuses to consider both legal questions and factual assertions that were not presented to the courts below. *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (refusal to consider legal claims first raised in petition for certiorari); *accord, Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) (refusal to consider new facts); *accord, Lawn v. United States*, 355 U.S. 339, 354 (1958). Petitioner's newly-raised legal argument therefore should not be considered.

The facts upon which petitioner's new ADA argument is based are also newly-raised in this Court. Indeed, throughout the proceedings below, petitioner adamantly refused to provide evidence in support of his allegations of disability, despite persistent demands and discovery requests from respondents. His first and only effort to provide evidence of disability is his inclusion of a Social Security Notice of Award at page nine of the Appendix to his Petition for Certiorari.

As Magistrate Judge Smith noted in his ruling recommending dismissal of petitioner's complaint:

> If the plaintiff is attempting to claim a medical excuse as his reason for failing to appear at the scheduled deposition, he has provided the court with absolutely no proof.

(Respondents' Appendix at 16). This essential factual ruling was adopted by the District Court and was affirmed by the Second Circuit.

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accusations, he contended that the defendants had violated the ADA in failing to refer him to work on construction sites. These asides were irrelevant as petitioner's complaint was based solely on the alleged violation of the union constitution and by-laws. He did not plead a cause of action under the ADA. Nor could he have amended his complaint, as the statute of limitations had expired before the first occasion on which petitioner mentioned the ADA.

As petitioner's newly-proffered evidence of disability was not made a part of the record below, this Court should refuse to consider it. *New Haven Inclusion, supra*; *Lawn v. United States, supra.* It should instead defer to the two lower courts' findings that petitioner had provided no credible, legitimate reason for his nonattendance at deposition. *Goodman v. Lukens Steel Company*, 482 U.S. 656, 665 (1987) (no review of "concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error."); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 n.7 (1979); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978), *citing Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Even if this Court were inclined to consider petitioner's newly-produced document, the document itself fails to support petitioner's position that he should be excused from his noticed deposition. At best, the Award proves that petitioner is disabled from working on a regular and substantial basis. It does not prove that he cannot attend a deposition and give testimony, or that he should be excused from nonattendance without notice.

There are additional reasons why petitioner's ADA claim must fail. First, petitioner has misread Rule 30 of the Federal Rules of Civil Procedure throughout this litigation to state that his deposition had to be held at the location of the District Court in which his lawsuit was pending; i.e., in Bridgeport, CT. (Petition at 7). Petitioner resides in Bridgeport. The Rules merely limit the reach of a subpoena when the deponent resides outside the district in which an action is pending. The petitioner's January 26, 1995 deposition was to be held in East Hartford, CT, which is in the same district as Bridgeport. Thus, the lower courts did not condone a breach of Rule 30.

Second, petitioner fails to acknowledge that depositions are customarily taken in the deposing attorney's office.

The District Court agreed, and explicitly held that under the circumstances of the case, "It is not at all unreasonable that the deposition which the defendants seek to take be conducted in the office of defendants' attorney. . . ." (Respondent's Appendix at 2 & 13). Petitioner never moved for reconsideration of this order.

Third, petitioner makes reference to January as the "statistically worst month of the year", deceptively implying that travel conditions were adverse on January 26, 1996. (Petition at 9). In fact, plaintiff did not present, and could not have presented evidence below to demonstrate that weather played a legitimate role in his failure to attend his deposition. Again, the lower courts' rulings that petitioner had presented no credible excuse for non-attendance are entitled to great deference.

Fourth and finally, petitioner repeatedly states that he had asked the lower court to postpone the deposition, presumably to accommodate his alleged disability. This assertion is false. As the District Court noted and as the record confirms, "on January 18, 1995, the plaintiff filed motions for written questions to the deposition and for the deposition to be taken by telephone. The plaintiff did not file for an extension of time." (Respondents' Appendix at 14).

In sum, even assuming that this Court would consider the newly-raised ADA argument, that claim is a fact-bound one which turns fundamentally on petitioner's assertions of disability and on the reasons for his non-attendance at deposition. The two courts below held, on the factual record before them, that no medical excuse had been proven and that no legitimate grounds for non-attendance had been presented. These essential factual findings cannot be properly disturbed.

II. PETITIONER HAS FAILED TO RAISE PROPER GROUNDS FOR RECUSAL UNDER SECTION 455(a).

Petitioner's arguments for recusal of both District Judge T. F. Gilroy Daly (now deceased) and Magistrate Thomas P. Smith (Petition at 10-11), based on unsubstantiated claims of bias and pro-union sentiment, are devoid of merit. They amount to nothing more than improper judge-shopping, in the wake of the court's dismissal of petitioner's lawsuit as a sanction for discovery abuse.

Section 455(a) requires disqualification only where a reasonable person, knowing the relevant facts, would expect that a judge has knowledge of facts that would give him or her an interest or bias in the case. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1987). "Quite simply . . ., recusal is required whenever 'impartiality might reasonably be questioned.'" *Liteky v. United States*, 510 U.S. 540, 548 (1994), *citing* 28 U.S.C. Section 455(a).

Petitioner has presented no evidence to support a claim of bias. Only petitioner knows how he has divined that Magistrate Judge Smith is "an admitted card-carrying member of a union" (Petition at 11), as there is no evidence to that effect. Even if there were, such membership would provide no proper grounds for recusal, especially where the union in question presumably is other than one of the construction union litigants in this case. *See e.g., Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1987) (judge's former membership in plaintiff association does not require recusal); *Maier v. Orr*, 758 F.2d 1578, 1581 (Fed. Cir. 1985) (judge's former association with Air Force does not raise appearance of partiality); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) (judge can properly sit in case involving alma mater); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978),

cert. denied, 439 U.S. 1072 (1979) (judge's prior representation of a party does not automatically warrant disqualification); *Parrish v. Bd. of Comm'rs of Alabama State Bar*, 524 F.2d 98, 104 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (judge's acquaintance with witnesses and defense counsel does not require recusal). Any interest of the Magistrate in the subject matter of this case, based on imagined union membership or sympathy, is so very remote, tangential and contingent as to raise no reasonable concern of bias.

Petitioner's claims of allegedly biased judicial rulings also provide no grounds for recusal. Petitioner resorts to sheer fabrication when he cites respondents' tampering with documents and the Magistrate Judge's endorsement of such conduct. (Petition at 10-11). When petitioner first raised this scandalous claim below, the Magistrate properly ordered him to disclose the alleged source of his information, or forever be barred from making such an allegation. (Respondents' Appendix at 5). Petitioner was also instructed to make his accusations by way of affidavit. (Respondents' Appendix at 6). Petitioner failed to pursue his accusation in that he neither produced his alleged evidence nor filed an affidavit. Surely, the Magistrate Judge's efforts to silence petitioner's *ad hominem* attacks cannot be invoked as grounds for disqualification.

Petitioner also falsely claims that Magistrate Smith prevented evidence regarding union RICO violations "from coming to light" by striking that portion of his Complaint. (Petition at 11). No such order was ever entered by the Magistrate. Rather, Judge T. F. Gilroy Daly ordered portions of the complaint stricken after the first year of litigation. He did so, as his court order indicates, because much of the complaint failed to state an intelligible cause of action. (Ruling on Defendants' Motion to Dismiss, March 29, 1993).

In *Liteky v. United States*, 510 U.S. 540 (1994), this Court cautioned that judicial rulings alone almost never

constitute a valid basis for recusal. Opinions formed by a judge based on the course of litigation cannot serve as grounds for recusal unless they display "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555. Such is not the case here. While the lower court's rulings were obviously not to petitioner's liking, they were appropriate, consistent with the governing law, and betrayed no partiality.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AND COSTS AGAINST PETITIONER.

Petitioner attacks the District Court's Rule 37 assessment of $2,344.00 in fees and costs associated with respondents' failed attempt to depose him on January 26, 1995. (Petition at 12-13). As the court's assessment of this discovery sanction was not an abuse of discretion, *National Hockey League v Metropolitan Hockey Club,* 427 U.S. 639 (1976), this ruling provides no grounds for granting petitioner's writ.

The lower court made proper factual findings: that petitioner had provided "absolutely no proof" of a medical disability excusing his non-attendance at deposition; that he "willfully failed to appear" and thereby disobeyed a direct order of the court; and that he had failed to offer prior notice of his non-attendance to respondents' counsel. (Respondents' Appendix at 15-16). Petitioner's current factual assertions to the contrary are falsities.

Moreover, the costs awarded were not only reasonable but well documented. The Magistrate Judge held in his order that "The defendants have submitted statements breaking down their expenses associated with the attempt to depose the plaintiff. This court finds the expenses submitted to be reasonable with respect to the January 1995 deposition." (Respondents' Appendix at 17 n.4).

Once again, the lower court's fact-bound rulings regarding this discovery sanction, subsequently affirmed by the

Second Circuit Court of Appeals, are entitled to great deference. *Goodman v. Lukens, supra; Foust, supra; Ceccolini, supra; Graver Mfg., supra.* And given these factual findings, and the repeated court warnings that petitioner's continued discovery misconduct would result in sanctions (Respondent's Appendix at 1, 3 & 11),[4] the court's decision to award attorneys' fees may not be properly disturbed. *National Hockey League, supra; Valentine v. Museum of Modern Art,* 29 F.3d 47, 49 (2d Cir. 1994); *Minotti v. Lensink,* 895 F.2d 100, 102 (2d Cir. 1990); *Bobal v. Rensellaer Polytechnic Institute,* 916 F.2d 759, 764 (2d Cir. 1990), *cert. denied,* 499 U.S. 943 (1991).

IV. GIVEN THAT THE RULE 37 DISCOVERY SANCTION WAS NOT AN ABUSE OF DISCRETION, THE ALLEGED IMPORTANCE OF PETITIONER'S UNDERLYING CASE CANNOT JUSTIFY A REEXAMINATION OF THE LOWER COURT'S DISMISSAL ORDER.

Petitioner requests this Court to grant his writ and reverse the dismissal of his lawsuit because of the "national importance" of his underlying claims. In essence he is seeking a sympathy vote, asking this Court to interfere with the district court's Rule 37 sanctions, not because of any abuse of discretion, but because of the compelling substantive nature of his lawsuit. The Court has previously rejected such a role:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in doing so. . . .
>
> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight,

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[4] As early as October 12, 1993, the Court warned that "continued violation of . . . discovery obligations will result in the imposition of sanctions, including attorneys' fees and/or dismissal with prejudice of this lawsuit." (Respondents' Appendix at 1).

> to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court. . . .
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League supra, 427 U.S. at 642.

By the time the district court issued its Rule 37 dismissal sanction, petitioner had: 1) terminated his first deposition at the outset by reading from a prepared statement that he was incapacitated by medication and therefore unable to testify or to recall; 2) defied numerous court orders compelling compliance with interrogatories and requests for production, thus delaying the litigation for eighteen months; 3) ignored repeated written warnings from the court that further noncooperation in discovery could result in dismissal; and 4) willfully failed to attend his second noticed deposition, in defiance of a court order, without providing advance notice to counsel of his non-attendance. On these facts, no abuse of discretion may be found. *See Minotti, supra; Valentine, supra; Bobal, supra.*

As to the "compelling nature" of petitioner's claims, that nature has been well hidden from both respondents and the lower courts, given petitioner's persistent refusal to cooperate in discovery or to abide by the court's dis-

covery orders.[5] To allow petitioner to cite the alleged merits of his claims as grounds for relief, when he has interfered with the proper discovery of them, would reward the abusive conduct which prompted the Rule 37 sanction.

CONCLUSION

For the foregoing reasons, this case presents no issues worthy of this Court's plenary review. Accordingly, the petition should be denied.

Respectfully submitted,

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[5] Respondents do note that petitioner's complaint states no ADA claim, *see* footnote 3 *supra*, and therefore does not encompass his current claims regarding "reasonable accommodation" of the disabled on the worksite. (Petition at 14). Petitioner's complaint dealt exclusively with technical union rules for job placement. Moreover, petitioner's assertion of substantial damages for denied employment opportunities is largely belied by his unsubstantiated claims below that he was medically disabled from any significant physical activity in this litigation. If petitioner was physically incapable of gathering documents for discovery production or of testifying at deposition, it is unlikely he could perform work on a construction site.